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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

DAVID H. LUCAS,
Petitioner
v.
SOUTH CAROLINA COASTAL COUNCIL,
Respondent

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Whether landowners are entitled to compensation under the Fifth Amendment to the U.S. Constitution when the government bars development in the interest of public safety.

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INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") respectfully submits this brief *amicus curiae* in support of petitioner, David H. Lucas.[1] The Chamber is the largest federation of business companies and associations in the world. With substantial membership in each of the 50 states, the Chamber represents nearly 180,000 businesses and organizations and serves as the principal voice of the American business community. An important function of the Chamber is to

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[1] Both petitioner and respondent have consented to the Chamber's filing of this brief. The parties' consent letters are being filed simultaneously with this brief.

represent the interests of its members in important matters before this Court, the lower courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing briefs in cases of importance to the business community addressed by this Court. *E.g.*, *Pacific Mutual* v. *Haslip*, 111 S.Ct. 1032 (1991), *Gilmer* v. *Interstate/Johnson Lane*, 111 S.Ct. 1647 (1991) and *NLRB* v. *Curtin Matheson Scientific*, 110 S.Ct. 1542 (1990).

Real property is a substantial asset of many of the Chamber's members. In the case of small business, which represent the vast majority of the Chamber's membership, *real* property may be the most substantial asset of the business. Thus, the question presented by the instant case—whether landowners are entitled to compensation under the Fifth Amendment of the United States Constitution when the government undertakes a regulatory taking—is of great concern to all Chamber members. These members take issue with the "bright-line" test established by the South Carolina Supreme Court, which allows governments to evade the constitutional obligation of just compensation merely by proving it is acting pursuant to legitimate police powers. As owners of commercial property, Chamber members take issue with the decision of the South Carolina Supreme Court, which forces property owners to bear the economic burdens of government action taken for the public good. The Chamber has a strong interest in the constitutional protection of the property rights of its membership.

STATEMENT OF THE CASE

Petitioner, David H. Lucas, purchased two lots on the Isle of Palms, Charleston County, South Carolina in 1986. Both lots were zoned for single-family residential use. Lucas intended to build a house on each property, one for his own family and one for resale.

In 1988, South Carolina passed the Beachfront Management Act, S.C. Code Ann. Section 48-39-10 *et seq.* (1990 Cum. Supp.) ("the Act"). The Act was designed to protect critical areas of South Carolina's beach and dune system by limiting construction along the coastline. Pursuant to the Act, the respondent, South Carolina Coastal Council, drew baseline and setback lines along the South Carolina coast. A setback line was drawn behind Lucas's properties, precluding him from building anything more than a small deck or walkway.

Lucas filed an action in the Circuit Court of Charleston County claiming that the Act amounted to a "taking" of his property without just compensation in violation of the South Carolina and United States Constitutions. The Circuit Court agreed and awarded Lucas more than a million dollars in damages. On appeal, the Supreme Court of South Carolina reversed.

SUMMARY OF ARGUMENT

The decision of the Supreme Court of South Carolina should be reversed because, contrary to this Court's rulings, it forces private property owners to bear the cost of government regulations that benefit society as a whole. Regulations that "go too far" can effect a taking of property for which compensation is due under the Fifth Amendment. *Pennsylvania Coal* v. *Mahon*, 260 U.S. 393 (1922). This Court answers the question of whether a regulation goes "too far," and compensation is due, by analyzing the nature of the interference with private property and weighing it against the public purpose of the regulation. The South Carolina Supreme Court ignored this approach.

The South Carolina court's decision precludes compensation where the state acts pursuant to legitimate police powers, regardless of the economic harm to the property owner. By doing so, the court equates legitimate exercise of police power with abatement of a nuisance, mis-

reading this Court's decision in *Mugler* v. *Kansas*, 123 U.S. 623 (1887). Thus, under the South Carolina court's ruling, only *illegitimate* exercises of a government's power require compensation to the property owner.

The Chamber urges this Court to clarify its long-standing test used for determining whether compensation must be paid for a regulatory taking. The Chamber proposes a rule that requires examination of both the nature of the regulation *and* the nature of the interference with property rights. Regulations that abate a nuisance—the noxious use of property—have, by nature, a very different objective than regulations that serve legitimate public purposes. While the government should be able to adversely affect the value of property that causes harm to others, it should not be able to single-out private property owners to bear the burden of legitimate regulation that promotes the public good.

Moreover, the compensation to be paid to a property owner should equal that owner's reasonable investment backed expectation in the property, including any expenditures toward a goal subsequently prevented by the government action at issue. This proposed rule only provides compensation for actual harm or loss to the property, not future expected profits or value. In addition, by using this measure, this Court can "make a property owner whole" without awarding compensation for speculative economic interests.

For these reasons, the Chamber urges this Court to reverse the decision of the Supreme Court of South Carolina.

ARGUMENT

I. THE SOUTH CAROLINA SUPREME COURT'S DECISION CONFLICTS WITH THE RULINGS OF THIS COURT.

A. This Court's Rulings Recognize that the Government Must Compensate Individuals Adversely Affected By Regulations that Benefit Society As A Whole.

The Fifth Amendment prohibits the government from taking private property without just compensation. This prohibition was initially applied only where the government physically occupied or appropriated private property. Subsequently, this Court recognized that "non-acquisitive" government action—such as the promulgation of a regulation—may amount to a taking for which compensation should be paid. *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922).

Discussion of this Court's takings analysis begins with *Mugler* v. *Kansas*, 123 U.S. 623 (1887). In *Mugler*, the Court held that a state statute prohibiting the manufacture of liquor did not amount to a taking of the property of the beer manufacturer. According to the Court, the prohibitory regulation did not constitute a taking because no property had actually been physically appropriated by the state. The Court reasoned that a "prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot in any sense, be deemed a taking or appropriation of property for the public benefit." 123 U.S. 668-69. This is often referred to as the *Mugler* nuisance exception.

The focus of this Court's analysis in takings cases changed in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922), where the Court recognized that regulation could deprive a property owner of the economic value of his property as effectively as physical occupation. The Court,

in *Pennsylvania Coal*, invalidated the Kohler Act, a Pennsylvania statute prohibiting the mining of coal under certain circumstances. Indicating that the distinction between a "taking" and a "regulation" is one of degree, the Court stated: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes *too far* it will be recognized as a taking." *Id.* at 415 (emphasis added). Public benefit is not sufficient justification to deprive a property owner of his land without compensation: ". . . a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." 260 U.S. at 416. In *Pennsylvania Coal*, this Court recognized that any inquiry concerning the effect of a regulation, regardless of its validity, must focus on the nature of the interference with property ownership.

Whether a regulation goes too far—and becomes a taking for which compensation is due—has been the subject of considerable discussion since *Pennsylvania Coal*. For the most part, the post-*Pennsylvania Coal* decisions have determined whether a compensable taking has occurred by weighing the public interest fostered by a regulation against the private economic harm caused by it. Accordingly, in *Penn Central Transportation Co.* v. *New York*, 438 U.S. 104 (1978), this Court upheld a New York City Landmark Preservation Law, which prevented the plaintiff from destroying or altering its property, Grand Central Terminal. The Court pointed to the following factors in determining whether compensation is due under the takings clause: the extent to which the regulation has interfered with an investment backed expectation, and the character of the governmental action. 438 U.S. at 124. The Court established that where the regulatory purpose significantly advances an important governmental interest, and the loss of value to the property owner is minimal, compensation is not due. This analysis

suggests that if the loss of value to the property owner is greater, compensation is required.

Indeed, the dissent in *Penn Central* concluded that the property owners had suffered a considerable diminution in the value of their land, enough to constitute a taking. More importantly, though, for purposes of understanding the South Carolina court's decision, the dissent made reference to the *Mugler* nuisance exception. The dissent stated that "As early as 1887, the Court recognized that the government can prevent a property owner from using his property to injure others without having to compensate the owner for the value of the forbidden use." 438 U.S. 104, 143 (citing *Mugler* v. *Kansas*, 123 U.S. 623 (1887)). The dissent, however, went on to say that since there was no nuisance in *Penn Central*, compensation was due.

Most recently, this Court developed a two-part test for determining whether a regulatory taking has occurred. According to the Court, "a regulation can effect a taking if it 'does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land.'" *Keystone Bituminous Coal Association* v. *DeBenedictis*, 480 U.S. 470, 485 (1987) (quoting *Agins* v. *Tiburon*, 447 U.S. 255 (1980)). The statute at issue in *Keystone* required coal mine operators to leave fifty percent of the coal located under the ground to support surface structures. The Court weighed the public purpose of the statute (protecting the state's health, safety, conservation and fiscal integrity) against its burden on the property owner (no sufficient diminution in value because of the limited value of the coal involved) and determined that no compensation was due. Thus, very recently this Court has recognized the need to weigh the nature of the regulation against the value of the property destroyed.

B. The South Carolina Supreme Court's Expansion of the Nuisance Exception Eviscerates the Takings Clause.

In the present case, the South Carolina Supreme Court held that the South Carolina Beachfront Management Act did not effect a regulatory taking of petitioner's coastal property. The court emphasized that since the regulation was enacted pursuant to legitimate state police powers, just compensation was not due. To support its reasoning, the court drew upon the "nuisance exception" originally described in *Mugler* v. *Kansas*, 123 U.S. 623 (1887), and referred to in the dissent in *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978). According to the court, state actions which are designed to protect against serious public harm, such as promulgation of the Beachfront Management Act, do not effect a taking under the Fifth Amendment. By equating any legitimate exercise of police power with a nuisance, the court failed to even examine the economic harm suffered by the petitioner.

The South Carolina Supreme Court read *Mugler* together with *Keystone* to virtually preclude compensation when the state acts pursuant to a legitimate police power. The consequence of this analysis is to equate any exercise of police power with the abatement of a nuisance, and thereby preclude compensation for anything but an illegitimate exercise of police power. This analysis ignores the warning enunciated in *Pennsylvania Coal* that even legitimate regulations that go "too far" amount to a taking. 260 U.S. at 415. It allows the government to place the financial burden of a regulation, that benefits society as a whole, on a limited group of property owners.

The nuisance exception to the takings clause allows the government to prevent misuse or illegal use of property. *Curtin* v. *Benson*, 222 U.S. 78 (1911). The South Carolina court has expanded the exception to swallow the rule by holding, in effect, that all statutes justified by a state's police power fit the exception. This holding eviscerates

the long-standing rule that the government must compensate those whose legitimate property interests are diminished by legitimate regulation. This Court specifically rejected this position in *Keystone* when it said that the "(nuisance) exception is not coterminous with the police power." 480 U.S. at 490-492.

Contrary to the holding in *Keystone*, the South Carolina Supreme Court's analysis assumes that the effects of only *illegitimate* regulation require compensation. The South Carolina Supreme Court's decision requires claimants to challenge the legitimacy of a regulation before a successful claim for a taking can be made. This approach is flawed for two reasons: first, it presumes that all exercises of a state's power are directed against nuisances; and second, it ignores the reality that a regulation may at the same time legitimately advance a state interest and deprive a property owner of the economic use of his land. This Court has recognized that regulatory takings should not be accomplished at the expense of property owners who must ". . . bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *U.S.*, 363 U.S. 40, 49 (1960).

II. THIS COURT SHOULD CLARIFY THE LONG-STANDING TEST THAT WEIGHS THE PUBLIC PURPOSE OF A REGULATION AGAINST A PROPERTY OWNER'S LOSS OF REASONABLE INVESTMENT BACKED EXPECTATIONS IN THE PROPERTY.

A. The Court Should Differentiate Between A Regulation That Serves A Public Purpose and One That Abates A Nuisance.

The first prong of the Chamber's proposed test for determining whether a regulatory taking has occurred considers the public purpose of the regulation. As part of this test, the Chamber urges this Court to make two definitive statements: first, that the nuisance exception is narrower than the exercise of legitimate police power; and second, that the government, in exercising its legiti-

mate police powers, must proceed by the constitutional mechanism of paying for a regulation's effect on the rights of owners of property.

The government should be given its greatest authority when it acts to prohibit a nuisance—the noxious use of property. However, as the dissent in *Keystone* pointed out, the term "nuisance" must be narrowly construed. The government acts to prohibit a nuisance when ". . . it exercises its unquestioned authority to prevent a property owner from using his property to injure others." 480 U.S. at 511-12 (citing *Goldblatt* v. *Hempstead*, 369 U.S. 590 (1962), *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915), *Mugler* v. *Kansas*, 123 U.S. 623 (1887)). Thus, it is acceptable for the government to adversely affect the economic value of property that causes harm to others.

The nuisance exception should be limited to cases in which the economic value allegedly affected is the nuisance; for example, the sale of intoxicating liquors in *Mugler* or the coal that supported the surface in *Keystone*. This Court previously recognized that any broad exception improperly imposes society's burdens on a few individual property owners. *Keystone* at 513. "A broad exception to the Just Compensation Clause based on the exercise of multifaceted health, welfare, and safety regulations would surely allow government much greater authority than we have recognized to impose societal burdens on individual landowners, for nearly every action the government takes is intended to secure for the public an extra measure of 'health, safety, and welfare.'" *Id.* Only by restricting the nuisance exception to include the most injurious use of property, and only those situations where the economic value affected is the direct result of the nuisance itself, can this Court protect against an exception that would engulf the takings clause.

Second, exercises of *legitimate* government police power can still effect a taking, for which compensation is due. Property owner's should not bear the cost of government action which benefits the public as a whole. In the present

case, because the petitioner did not challenge the validity of the Beachfront Management Act, the South Carolina Supreme Court assumed that the Act was designed to prohibit noxious use of the coastal property. This Court has long recognized that just compensation must be paid for property taken by legitimate state regulation. *Pennsylvania Coal* at 415. The theory behind the rule is that a few should not have to pay for a benefit to society as a whole. Therefore, the property owner should be able to concede the public good of a particular regulation without being singled-out for the cost of achieving that public good.

B. Property Owners Affected By Regulations Enacted For the Public Good Should Be Compensated For Their Loss of Reasonable Investment Backed Expectations.

The Chamber proposes a rule that requires an examination of both the nature of the regulation *and* the nature of the interference with property rights. The government should have great authority to regulate nuisances without compensating those who create the nuisance. On the other hand, the government should be required to compensate innocent property owners whose property does not constitute a nuisance, but who bear the economic brunt of regulation intended to benefit the public condition. The compensation to be paid should equal the property owner's reasonable investment backed expectation, which the Chamber proposes be defined as investment in the property, including any expenditures toward a goal subsequently prevented by the government action at issue.

The proposed rule recognizes that there are certain instances in which the economic burden of a legitimate regulation is so unequally distributed that, however compelling the purpose of the regulation, compensation should be paid. This is one such instance. Petitioner purchased two beachfront lots on the Isle of Palms, South Carolina with the intention of building two homes on the property.

After he purchased the property, South Carolina enacted the Beachfront Management Act, which prevents petitioner from building on the property. As a result, petitioner's lots became essentially valueless. Unless petitioner receives compensation for the loss of value of his property, he will be forced to bear individually the economic burden of a regulation that was enacted to serve the public good.

This case features a total taking by the government. There is no dispute that the effect of the Beachfront Management Act was to deprive Mr. Lucas of the entire value of his coastal property. The Court should, however, recognize that most cases involve regulations which fall short of a total deprivation of property, and the Court may wish to provide guidance for these situations as well. The Chamber encourages this Court to recognize that the government, acting pursuant to legitimate police power, may cause a property owner to suffer a partial loss in value of his property, measured by a loss of reasonable investment backed expectations, and that the loss should be compensated. In *Ruckelshaus* v. *Monsanto*, 467 U.S. 986 (1984), this Court determined that a pesticide producer had a property interest protected by the Fifth Amendment in environmental data submitted to the EPA, and that the producer was entitled to compensation for the taking of that property for a six-year time period. In doing so, the Court identified "interference with reasonable investment backed expectations" as one factor, among others, that should be considered when determing whether a regulatory taking has been effected and compensation is due. 467 U.S. at 1005.

The measure of compensation the Chamber proposes is based on actual loss or injury to the property owner. In *Ruckelshaus*, this Court recognized that a " 'reasonable investment backed expectation' must be more than a 'unilateral expectation or an abstract need.' " 467 U.S. at 1005. When government regulations restrict a property owners use of his land, compensation that replaces the

loss sustained—not future expected profits or value—should be awarded. For example, assume Mr. X owns ten acres of land. On two acres, he operates a commercial stable where he boards ten horses. The remaining eight acres are for Mr. X's residential use. Further, assume that Mr. X just contracted with a builder to expand the stable and has purchased building materials. Suppose, as a means of reducing traffic congestion and overcrowding, a regulation is enacted precluding commercial buildings in Mr. X's neighborhood. Mr. X claims he is owed compensation for the taking of his commercial property. Under the Chamber's proposed test, Mr. X's reasonable investment backed expectations concerning the stables, includes such factors as the value of the equipment in the stable, the value of the building materials purchased, any payments to the builder, and the appraised loss of value of an operating commercial stable such as the one in existence prior to the enactment of the regulation. However, any compensation is limited by alternative uses of the property. By factoring alternatives uses of the property into the compensation, Mr. X receives sufficient compensation to "make him whole," but does not receive payment for speculative economic interests.

Thus, as seen from this example, the Chamber's proposed rule accomplishes two important goals. First, the rule compensates property owners only for actual harm or loss to their property, not future expected harm or value. And, second, the rule saves property owners from bearing the brunt of a regulation that promotes the public good.

CONCLUSION

For the reasons stated above, the Chamber of Commerce of the United States of America respectfully urges this Court to reverse the decision of the Supreme Court of South Carolina.

Respectfully submitted,

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